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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES CITY COUNTY, VIRGINIA,

PETITIONER,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS,

RESPONDENTS.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN WATER WORKS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Water Works Association (hereinafter "AWWA") is the largest water supply organization in the world. AWWA is a non-profit, scientific and educational society for water supply professionals and organizations that was founded 113 years ago. AWWA's membership includes 3,900 utilities that supply about 75 per cent of the nation's drinking water. More than 55,000 water treatment operators, managers, engineers, environmentalists, scientists, water supply regulators, manufacturers, and academicians are

also members of AWWA. Petitioner James City County (hereinafter "JCC") is a member of AWWA. [1]

The decision of the Court of Appeals has important ramifications that extend far beyond the boundaries of Virginia. Many new reservoirs will be needed throughout the country to meet critical water supply needs of the future. AWWA is concerned that the decision of the Court of Appeals jeopardizes reliable water supplies by excusing the Environmental Protection Agency (hereinafter "EPA") from considering the essential need for water in decisions on applications to create future water reservoirs. Despite the ever-increasing need for new water supply projects to meet the demands of growing populations, the Court of Appeals' ruling allows EPA to halt the essential efforts of AWWA members to fulfill their vital public mandate.

Unless the decision is reversed, water projects across the nation may be blocked or cast into uncertainty, without any consideration of the often desperate need for additional water supplies. As a result, millions of people may be deprived of essential water.

SUMMARY OF ARGUMENT

This case is a matter of vital national interest, involving the availability of one of the necessities of human life -- water. The Court of Appeals' decision poses a major threat to the future water supplies of states and localities across the nation, because it allows EPA to veto essential projects without even considering the need for those projects. Unlike natural disasters that threaten

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[1] Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk of the Court.

water supplies, this new threat -- an EPA veto that ignores the need for water -- is both unnatural and unlawful. The Clean Water Act clearly requires EPA to consider the need for water supplies in determining whether to veto a particular project on environmental grounds. This Court should review the lower court's decision both because of its massive impact and because of the substantial error of law that was made below.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Jeopardizes the Nation's Long-Term Public Water Supplies.

The Environmental Protection Agency vetoed the proposed reservoir project in this case based solely on its evaluation of environmental effects, without even considering the locality's desperate need for the water the project could provide. The decision creates a frightening precedent for all localities and water suppliers in the United States. JCC's situation is typical. Population growth and population redistribution is drastically increasing demand for usable water in many areas, while natural supplies of fresh water are severely limited. In most such areas, the increased need for water simply cannot be met without the construction of a dam and reservoir, a project requiring a permit under section 404 of the Clean Water Act.

A. The Demand for Public Water Is Increasing Dramatically.

The population of the United States increases by 1.5 per cent *each year*. This means the addition of more

than 3 million people annually. The population of the arid regions of the United States, where water supplies are scarcest, is growing even faster. California, Arizona, New Mexico, Texas, Nevada, Oklahoma, and Kansas grew by 6.9 per cent, or 1,023,000 people a year, between 1990 and 1994.

If current levels of water conservation and average domestic use remain the same, the total national demand for water will be approximately 48 billion gallons *per day* by the year 2010. This means that in the next 15 years, the water supply in the United States must grow by approximately six billion gallons a day, a 14 per cent increase over current production.

Expanded use of current water supplies and conservation efforts simply cannot keep up with population growth of this magnitude. This is particularly true for areas that are magnets for redistribution of population, but do not have extensive untapped water resources. The record below shows that JCC is such an area, and there are many others, such as arid portions of the Sunbelt, that are attracting significant migration of population.

B. Additional Surface Water Reservoirs Will Be Needed to Provide Additional Public Water Supplies.

The major sources of the public water supply are groundwater, river and lake withdrawals, and surface water reservoirs. Currently, groundwater satisfies 41.9 percent of annual municipal water needs. Reservoirs are the only source that can be significantly expanded to meet new demands for water.

Many communities, like JCC, are not able to meet the demand for water by relying on groundwater alone,

and in many cases, may not be able to rely on groundwater for even part of needed water supplies. For communities across the country, like JCC, that rely on groundwater, contamination and a falling water table are common problems. According to EPA estimates, 10 per cent of groundwater nationwide exceeds Safe Drinking Water Act standards for contaminants. Moreover, overdraw is causing the water table to drop in many regions, adding to the cost and difficulty of using groundwater to supply public water systems and endangering the future viability of this source. Accordingly, it is simply not practicable to look to increasing use of groundwater to solve future water shortfalls in most areas.

Similarly, with respect to river and lake withdrawals, in many areas such resources are already being used to the maximum extent possible.

Consequently, the only choice for most localities facing increased demand for water supplies is the construction of new surface water reservoirs.

In addition, the use of reservoirs often has environmental benefits compared to other options. Reservoirs provide a storage pool for managing pumping from river and groundwater supplies. Reservoir storage enables pumping from the reservoir when there is excess runoff and pumping groundwater during low river flows. Operating in this way has less impact on the environment than the continuous direct withdrawal required when storage is not available.

C. Allowing EPA to Veto Water Projects Without Considering Need Jeopardizes Essential Water Development Projects.

Many, if not all, reservoirs and impoundments of water have some adverse effect on the environment. Though these impacts vary, many past and present reservoirs would not have been built had EPA been able to wield the power it now claims, to veto projects without considering how much they are needed.

Such power gives EPA a chokehold over states, regions, and localities that have the obligation to provide adequate quantities of drinking water and water for other uses to their citizens. *See* Steven J. Koorse, P.E., *When Public Interests Clash with the Environment: The Ware Creek Case*, Environmental Engineer, July 1994, at 24.

The facts of this case suggest how far this power could go, and the tremendous potential for abuse. Among the reasons EPA rejected JCC's project was the finding that the mitigation plan was inadequate, in part because EPA believed it was insufficient in terms of area, and in part because EPA found that the mitigation areas would be *different* in certain respects from the area affected by the project. Thus, all EPA would ever have to do to veto a project would be to find that the mitigation plan did not replace the affected land with precisely the same kind of wetlands in precisely the same proportions -- a finding which will almost always be possible for the Agency to make. Accordingly, the Court of Appeals' decision essentially gives EPA unfettered discretion to veto a water project, no matter how great the need for the project might be, and no matter how extensive the mitigation plan might be.

In this case, the district court recognized the JCC's "desperate need for water," and held that EPA is

obligated to consider such need in the section 404 process. *James City County, Virginia v. United States Environmental Protection Agency*, 23 Envtl. L. Rep. 20,228, 20,229 (E.D.Va. 1992). The Court of Appeals' decision allows EPA to ignore that desperate need, and further allows EPA to ignore similar needs whenever it sees fit.

II. A Recent Survey Reveals the Massive Adverse Impact Across the Nation of the Court of Appeals' Decision.

AWWA recently surveyed public water systems to determine the impact of the Court of Appeals' decision.[2] The survey reveals that an estimated 107 public water systems plan to build a reservoir in order to meet projected needs of an additional 23 million people. Over three-quarters of these reservoirs will have more than minor environmental effects. Conceivably, then, EPA could use the power given it by the Court of Appeals' decision to deny permits in the near future for 80 different reservoirs, without ever considering the need for the water. Such vetoes could affect the vital water needs of approximately 17 million people. Indeed, the impact could be even greater, because if EPA is not required to

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[2] The survey is included in the appendix to this brief. The water suppliers surveyed were asked to state whether they planned to construct a reservoir, and whether the anticipated environmental impacts of the reservoir were minor, moderate, or significant. Respondents were also given the opportunity to add comments. Selections from these comments are included in the appendix, and they further demonstrate the massive national impact of the Court of Appeals' decision.

balance the need for a project against the adverse environmental impacts, the Agency could decide that even insignificant impacts are "unacceptable," and veto the project.

Accordingly, the Court of Appeals' decision has a drastic effect on the members of AWWA and the segments of the public they serve. AWWA thus strongly urges the Court to review this important issue.

III. The Clean Water Act Requires EPA to Consider the Need for Water Supplies.

Section 404 of the Clean Water Act authorizes the Administrator of the EPA to deny permits when he determines that the project will "have an *unacceptable* adverse effect on *municipal water supplies*, shellfish beds and fishing areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c) (emphasis added). "Unacceptable adverse effect" is not defined in the statute. The interpretation of section 404 adopted by the Court of Appeals, however, would simply read the word "unacceptable" out of the statute.

The presence of the word "unacceptable" can only mean that EPA is to determine whether the "adverse effect" of the project is acceptable or unacceptable in the context of other relevant facts. Obviously, the need for the project in the first place is one of the most highly relevant factors in deciding whether consequent environmental effects are "unacceptable." Adverse effects that might be unacceptable for a project that had little justification might be eminently acceptable in connection with a project that responded to a "desperate need" for a vital resource, such as drinking water.

The district court in this case correctly stated:

> The EPA neglects a significant consideration, however, when it completely ignores James City County's desperate need for water. No mention of this need is contained in the EPA's evaluation of the acceptability of the reservoir project. While the regulations governing Section 404(c) do not advise EPA of each of the limitless considerations that must enter an evaluation of a project's acceptability, the need for water is a factor it must consider.

23 Envtl. L. Rep. at 20,229. The district court also noted that the statute and the regulations require EPA to consider the effect of the project on "municipal water supplies," and that the veto of a water project obviously affects such supplies.

In *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Supreme Court established a two-step process for evaluating an agency's statutory interpretations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842 (footnote omitted). Only if the intent of Congress is unclear may the court proceed to the second step and ask whether the agency interpretation is based

upon a permissible construction of the statute. 467 U.S. at 843.

In this case, Congress' use of the word "unacceptable," coupled with its requirement that the effect on municipal water supplies be considered, shows that Congress directly answered the question at issue here, and required EPA to consider such factors as need for the project. If the word "unacceptable" is in any way ambiguous, EPA's interpretation is not permissible, because it would effectively read that word out of the statute entirely.

The Court of Appeals' decision is also contrary to the governing EPA regulations, which require the EPA Administrator to "take into account all information available to [her]" in making a determination under section 404(c). 40 C.F.R. § 231.1(a). Here, EPA refused to consider a vital piece of information that was clearly available -- JCC's desperate need for additional water supplies.

In short, as noted above, EPA's interpretation, and the Court of Appeals' decision, would give EPA unfettered discretion to decide that any adverse effects were "unacceptable," without considering the most relevant available information, the degree to which the proposed project is essential to the people of the affected area. This is contrary to the clear meaning of both the statute and the regulations, and, when coupled with the drastic effects of this interpretation outlined above, merits review by this Court.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari, reverse the judgment and order the case remanded to the U.S. EPA for further consideration of needs, alternatives, and impacts of the proposed action.

Respectfully submitted,

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APPENDIX

APPENDIX

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SPECIAL AWWA SURVEY IDENTIFYING IMPACT OF WARE CREEK DECISION

Survey Procedure

A survey was distributed to 218 water suppliers, including urban and rural suppliers of various sizes and in various parts of the country. Each supplier was asked to indicate whether it had plans for the construction of a water supply reservoir in the future. Suppliers answering in the affirmative were asked to indicate whether the expected environmental impacts of the reservoir were believed to be minor, moderate, or significant. Suppliers were asked to indicate how may persons would be served by planned reservoirs. Recipients of the survey were also asked to provide any comments they might have on the potential impact of the Court of Appeals' decision in *James City County, Virginia v. U.S. Environmental Protection Agency*. The survey was coordinated for AWWA by Dan W. Pedersen, P.E.

Survey Results

218 surveys were distributed to water suppliers, and, as of July 15, 1994, 97 suppliers (44.5%) had responded.

Of the water suppliers responding, 26 (or 26.8%) stated that they had plans to construct a reservoir, while 71 (or 73.2%) stated that they did not have plans to construct a reservoir.

If these percentages are projected to the 400 public water systems that are of a size and type that could practically construct a reservoir, AWWA estimates that approximately 107 water suppliers nationwide have plans to construct new reservoirs.

When the 26 water suppliers planning reservoirs were asked what the environmental effects of the reservoir projects were anticipated to be, six (or 23.08%) stated that the effects would be minor, 13 (or 50%) stated that the effects would be moderate, and 7 (or 26.92%) stated that the effects would be significant.

Based upon survey results, the average water supplier intending to construct a reservoir plans to serve an additional 217,692 persons. The 26 water suppliers in the survey indicating plans to construct reservoirs collectively would serve an additional 5,660,000 persons. If the percentages above are extrapolated to all water systems expected to build reservoirs, such systems would serve approximately 23,340,206 additional persons.

PERTINENT QUOTES FROM SURVEY FORMS

Unless something is done, we have seen the last reservoir of any size built in this country.

John A. McManus
Director of Water
New Britain, CT

The EPA would say any reservoir would have a significant impact. The EPA seems to be saying "No more reservoirs." Long-range human needs should have highest priority. We now make it too easy to defeat any project by additional studies, time delays, and trying to have zero environmental impacts (which is impossible).

Richard D. Hartman
General Manager
Appomattox River Water Authority
Petersburg, VA

We must as a nation decide if additional water supply for a growing population is worth potential environmental problems. The alternative is to tell people where they can live and work.

Ken Jones
Director of Utilities
Midland, TX

Our reservoir plans were set aside ten years ago due to environmental concerns.

William F. Haney
Asst. Util. Mgr.
City of Mesa, AZ

Dangerous precedent in putting people last and the environment first continues to fuel the fire of environmental zealots.

Stephen Stanziano
Dept. of Water
Jersey City, NJ

If this ruling stands, it has implications far beyond the siting of reservoirs. For instance, sewer outfalls, pipeline crossings, etc.

Ben Russel
Business Manager
Charlotte-Mecklenburg, NC

It is anticipated that the current development will continue to precipitate water crises nationally to the extent that public interest, welfare, and economical considerations will again meet priority consideration.

John Zimmerman
Water Division Manager
Manatee County Government, FL

An environmental impact that stalls or stops [our] project will be significant because there are limited high quality watershed sources in this area.

Gerald D. Gross
Utilities Operations Manager
Wichita Falls, TX

Balancing alternatives with environmental impact is a necessary component of civilization.

J. Richard Tompkins
President
Middlesex Water Co., NJ

Environmental impacts resulting from building a reservoir, from my experience, have always been significant.

Betty Gabbai
Gov't Affairs Coordinator
City of Dallas, TX

I would hope a public water supply would hold at least an equal priority with other environmental concerns.

Steve Himmel
Consumers Illinois Water Company
Kankakee, IL

LIST OF RESPONDENTS
PLANNING TO BUILD A RESERVOIR

RESPONDENT	POPULATION AFFECTED
TARRANT COUNTY, TX	1,000,000
GWINNETT COUNTY, GA	700,000
ALAMEDA, CO	500,000
DEKALB COUNTY, GA	500,000
MONROE COUNTY, NY	500,000
APPOMATTOX COUNTY, VA	350,000
LAREDO, TX	300,000
RI WATER RESOURCES BOARD, RI	300,000
TACOMA, WA	300,000
YORK WATER COMPANY, PA	225,000
SPRINGFIELD, IL	144,000
CITY OF AURORA, CO	100,000
SALEM, OR	100,000
SALT LAKE CITY, UT	100,000
WEBER BASIN WATER CON. DIST., UT	100,000
WICHITA FALLS, TX	100,000
NEW BRITAIN, CT	95,000
MANATEE COUNTY, FL	71,000
CONNECTICUT WATER CO., CT	50,000
CITY OF BROOMFIELD, CO	30,000
CENTENNIAL WATER AND SAN. DIST., CO	25,000
DESERT WATER AGENCY, CA	25,000
METRO WATER SERVICES	15,000
CHERRY CREEK VALLEY, CO	10,000
ERIE, PA	10,000
ROCKFORD, IL	10,000
TOTAL	5,660,000